



***New York State Board for Professional Medical Conduct***

*433 River Street, Suite 303 • Troy, New York 12180-2299 • (518) 402-0863*

Antonia C. Novello, M.D., M.P.H., Dr. P.H.  
*Commissioner  
NYS Department of Health*

Dennis P. Whalen  
*Executive Deputy Commissioner  
NYS Department of Health*

Dennis J. Graziano, Director  
*Office of Professional Medical Conduct*

Michael A. Gonzalez, R.P.A.  
*Vice Chair*

Ansel R. Marks, M.D., J.D.  
*Executive Secretary*

PUBLIC

October 13, 2004

***CERTIFIED MAIL-RETURN RECEIPT REQUESTED***

Seth S. Johnston, M.D.  
3150 Running Deer Circle  
Louisville, KY 40241

Re: License No. 160860

Dear Dr. Johnston:

Enclosed please find Modification Order #BPMC 02-337 of the New York State Board for Professional Medical Conduct. This modification order and any penalty provided therein goes into effect October 20, 2004.

If the penalty imposed by the Order is a surrender, revocation or suspension of this license, you are required to deliver to the Board the license and registration within five (5) days of receipt of the Order to the Board for Professional Medical Conduct, New York State Department of Health, Hedley Park Place, Suite 303, 433 River Street, Troy, New York 12180.

Sincerely,

Ansel R. Marks, M.D., J.D.  
Executive Secretary  
Board for Professional Medical Conduct

Enclosure

NEW YORK STATE DEPARTMENT OF HEALTH  
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER

OF

SETH S. JOHNSTON, M.D.

**MODIFICATION  
ORDER**

BPMC No. 02-337

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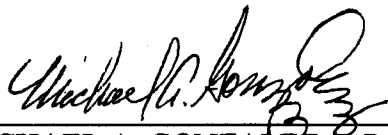
Upon the proposed Application for a Modification Order of **SETH S. JOHNSTON, M.D.**, (Respondent) for Consent Order, that is made a part of this Modification Order, it is agreed to and

**ORDERED**, that the attached Application, and its terms, are adopted  
**SO ORDERED**, and it is further

**ORDERED**, that this Modification Order shall be effective upon issuance by the Board, either by mailing of a copy of this Modification Order, by either first class mail, to Respondent at the address in the attached Application or certified mail to Respondent's attorney, or upon transmission via facsimile to Respondent or Respondent's attorney, whichever is earliest.

**SO ORDERED.**

DATED: 10/11/04

  
\_\_\_\_\_  
MICHAEL A. GONZALEZ, R.P.A.  
Vice Chair  
State Board for Professional  
Medical Conduct

STATE OF NEW YORK : DEPARTMENT OF HEALTH  
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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**IN THE MATTER**  
**OF**  
**SETH S. JOHNSTON, M.D.**

**APPLICATION TO**  
**MODIFY ORDER**  
**BMPC # 02-337**

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**SETH S. JOHNSTON, M.D.**, (Respondent) deposes and says:

That on or about December 3, 1984, I was licensed to practice as a physician in the State of New York, having been issued License No. 160860 by the New York State Education Department.

My current address is 3150 Running Deer Circle, Louisville, KY 40241 and I will advise the Director of the Office of Professional Medical Conduct of any change of my address within thirty (30) days thereof.

I am currently subject to a Consent Order, dated October 28, 2002, annexed hereto, made a part hereof, and marked as Exhibit I (hereinafter "Original Order"), that was issued upon a Consent Agreement and Order signed by me on October 15, 2002, (hereinafter "October 15, 2002, Order"), adopted by the Original Order.

I apply, hereby, to the State Board for Professional Medical Conduct for a Modification Order (hereinafter "Modification Order"), modifying the Original Order, as follows: to delete the paragraph in the Original Order that states:

Five (5) years probation, tolled until Respondent resumes the active practice of medicine in the State of New York, in accordance with the terms described in "Exhibit C" attached, hereto.

substituting therefore:


"Respondent shall never activate his registration to practice medicine in New York state or seek to reapply for a license to practice medicine in New York state."

The Modification Order to be issued will not constitute a new disciplinary action against me, but will substitute the proposed language for the above described language in the Original Order.

I am making this Application of my own free will and accord and not under duress, compulsion or restraint of any kind or manner, and seek the anticipated benefit of the requested Modification. In consideration of the value to me of the acceptance by the Board of this Application, I knowingly waive any right I may have to contest the Original Order or the Modification Order for which I apply, whether administratively or judicially, and ask that the Board grant this Application.

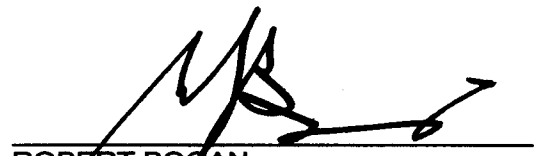
AFFIRMED:

DATED: 9/28/04

  
\_\_\_\_\_  
SETH S. JOHNSTON, M.D.  
Respondent

The undersigned agree to the attached application of Respondent and to the proposed penalty based on the terms and conditions thereof.

DATE: 30 September 2004

  
\_\_\_\_\_  
ROBERT BOGAN  
Associate Counsel  
Bureau of Professional Medical Conduct

DATE: 08 October 2004

  
\_\_\_\_\_  
DENNIS J. GRAZIANO  
Director  
Office of Professional Medical Conduct



"Exhibit 1"

**New York State Board for Professional Medical Conduct**

433 River Street, Suite 303 • Troy, New York 12180-2299 • (518) 402-0863

Antonia C. Novello, M.D., M.P.H., Dr. P.H.  
Commissioner  
NYS Department of Health

Dennis P. Whalen  
Executive Deputy Commissioner  
NYS Department of Health

Dennis J. Graziano, Director  
Office of Professional Medical Conduct

William P. Dillon, M.D.  
Chair

Michael A. Gonzalez, R.P.A.  
Vice Chair

Ansel R. Marks, M.D., J.D.  
Executive Secretary

October 29, 2002

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

Seth S. Johnston, M.D.  
3150 Running Deer Circle  
Louisville, KY 40241

RE: License No. 160860

Dear Dr. Johnston:

Enclosed please find Order #BPMC 02-337 of the New York State Board for Professional Medical Conduct. This Order and any penalty provided therein goes into effect October 29, 2002.

If the penalty imposed by the Order is a surrender, revocation or suspension of this license, you are required to deliver to the Board the license and registration within five (5) days of receipt of the Order to Board for Professional Medical Conduct, New York State Department of Health, Hedley Park Place, Suite 303, 433 River Street, Troy, New York 12180.

Sincerely,

Ansel R. Marks, M.D., J.D.  
Executive Secretary  
Board for Professional Medical Conduct

Enclosure

cc: James M. Burd, Esq.  
Whonsetler & Associates, P.S.C.  
6011 Brownsboro Park Blvd.  
Suite E  
Louisville, KY 40207

STATE OF NEW YORK : DEPARTMENT OF HEALTH  
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER  
OF  
SETH S. JOHNSTON, M.D.  
CO-02-03-1221-A

CONSENT  
AGREEMENT  
AND ORDER

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**SETH S. JOHNSTON, M.D.**, (Respondent) deposes and says:

That on or about December 3, 1984, I was licensed to practice as a physician in the State of New York, having been issued License No. 160860 by the New York State Education Department.

My current address is 3150 Running Deer Circle, Louisville, KY 40241 and I will advise the Director of the Office of Professional Medical Conduct of any change of my address within thirty (30) days thereof.

I understand that the New York State Board of Professional Medical Conduct has charged me with one (1) specification of professional misconduct.

A copy of the Statement of Charges is annexed hereto, made a part hereof, and marked as Exhibit "A," and a copy of the underlying Commonwealth of Kentucky, State Board of Medical Licensure, January 17, 2002, Agreed Order and Probation, upon which the New York State Department of Health, Statement of Charges is based, is annexed hereto, made a part hereof, and marked as Exhibit "B."

I have not practiced medicine in New York State since 1992 and I do not plan to return to practice medicine in New York State. I, therefore, do not contest Factual Allegation A, adding the word "alleged" before the word "sexually" where it appears two times in Allegation A, Factual

Allegation B(2), and the one (1) specification, in full satisfaction of the charges against me. I, hereby, agree to the following penalties:

Five (5) years probation, tolled until Respondent resumes the active practice of medicine in the State of New York, in accordance with the terms described in "Exhibit C" attached, hereto.

I further agree that the Consent Order for which I, hereby, apply shall impose the following conditions:

That, except during periods of actual suspension, Respondent shall maintain active registration of Respondent's license with the New York State Education Department Division of Professional Licensing Services, and pay all registration fees. This condition shall be in effect beginning thirty days after the effective date of the Consent Order and will continue while the licensee possess his/her license; and

That Respondent shall fully cooperate in every respect with the Office of Professional Medical Conduct (OPMC) in its administration and enforcement of this Order and in its investigation of all matters regarding Respondent. Respondent shall respond in a timely manner to each and every request by OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall meet with a person designated by the Director of OPMC as directed.

Respondent shall respond promptly and provide any and all documents and information within Respondent's control upon the direction of OPMC. This condition shall be in effect beginning upon the effective date of the Consent Order and will continue while the licensee possesses his/her license.

I, hereby, stipulate that any failure by me to comply with such conditions shall constitute misconduct as defined by New York State Education Law §6530(29).

I agree that in the event that I am charged with professional misconduct in the future, the agreement and order shall be admitted into evidence in that proceeding.

I, hereby, make this Application to the State Board for Professional Medical Conduct (the Board) and request that it be granted.

I understand that, in the event that this Application is not granted by the Board, nothing contained herein shall be binding upon me or construed to be an admission of any act of misconduct alleged or charged against me, such Application shall not be used against me in any way and shall be kept in strict confidence during the pendency of the professional misconduct disciplinary proceeding; and such denial by the Board shall be made without prejudice to the continuance of any disciplinary proceeding and the final determination by the Board pursuant to the provisions of the Public Health Law.

I agree that, in the event the Board grants my Application, as set forth herein, an order of the Chairperson of the Board shall be issued in accordance with same. I agree that such order shall be effective upon issuance by the Board, which may be accomplished by mailing, by first class mail, a copy of the Consent Order to me at the address set forth in this agreement or to my attorney or upon transmission via facsimile to me or my attorney, whichever is earliest.

I am making this Application of my own free will and accord and not under duress, compulsion or restraint of any kind or manner, in consideration of the value to me of the



acceptance by the Board of this Application, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits. I knowingly waive any right I may have to contest the Consent Order for which I, hereby, apply, whether administratively or judicially, and ask that the Application be granted.


AFFIRMED:

DATED: 10/15/02


  
\_\_\_\_\_  
SETH S. JOHNSTON, M.D.  
Respondent

The undersigned agree to the attached application of the Respondent and to the proposed penalty based on the terms and conditions thereof.

DATE: 10/15/02

  
\_\_\_\_\_  
JAMES BURD, ESQ.  
Attorney for Respondent

DATE: 21 October 2002

  
\_\_\_\_\_  
ROBERT BOGAN  
Associate Counsel  
Bureau of Professional Medical Conduct

DATE: 10/24/02

  
\_\_\_\_\_  
on DENNIS J. GRAZIANO  
Director  
Office of Professional Medical Conduct

"Exhibit A"

STATE OF NEW YORK                      DEPARTMENT OF HEALTH  
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER  
OF  
SETH S. JOHNSTON, M.D.  
CO-02-03-1221-A

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STATEMENT  
OF  
CHARGES

SETH S. JOHNSTON, M.D., the Respondent, was authorized to practice medicine in New York state on December 3, 1984, by the issuance of license number 160860 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

A. On or about January 17, 2002, the Commonwealth of Kentucky, State Board of Medical Licensure (hereinafter "Kentucky Board"), by an Agreed Order of Probation (hereinafter "Kentucky Order"), placed Respondent's license to practice medicine on probation for a period of five (5) years, with terms and conditions, based on having sexual contact with a patient while the patient was under his care and sexually harassing an employee.

B. The conduct resulting in the Kentucky Board's disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state Law:

1. New York Education Law §6530(2) (practicing the profession fraudulently);
2. New York Education Law §6530(17) (exercising undue influence on a patient);
3. New York Education Law §6530(20) (moral unfitness); and/or
4. New York Education Law §6530(31) (willfully harassing, abusing, or intimidating a patient either physically or verbally).

**SPECIFICATION**

Respondent violated New York Education Law §6530(9)(d) by having had disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York state, constitute professional misconduct under the laws New York state, in that Petitioner charges:

1. The facts in Paragraphs A and/or B.

DATED: *August 2*, 2002  
Albany, New York

*Peter D. Van Buren*  
PETER D. VAN BUREN  
Deputy Counsel  
Bureau of Professional Medical Conduct

NEW YORK STATE DEPARTMENT OF HEALTH  
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER  
OF  
SETH S. JOHNSTON, M.D.

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CONSENT  
ORDER

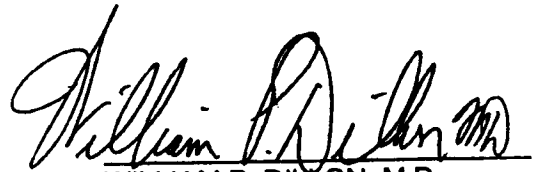
Upon the proposed agreement of **SETH S. JOHNSTON, M.D.** (Respondent) for Consent Order, which application is made a part hereof, it is agreed and

ORDERED, that the application and the provisions thereof are hereby adopted and so ORDERED, and it is further

ORDERED, that this order shall be effective upon issuance by the Board, which may be accomplished by mailing, by first class mail, a copy of the Consent Order to Respondent at the address set forth in this agreement or to Respondent's attorney by certified mail or upon transmission via facsimile to Respondent or Respondent's attorney, whichever is earliest.

SO ORDERED.

DATED: 10/28/02



WILLIAM P. DILLON, M.D.  
Chair  
State Board for Professional  
Medical Conduct

COMMONWEALTH OF KENTUCKY  
STATE BOARD OF MEDICAL LICENSURE  
CASE NO. 780  
ADMINISTRATIVE ACTION NO. 01-KBML-0080

FILED OF RECORD

JAN 17 2002

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY SETH S. JOHNSTON, M.D., LICENSE NO. 31767,  
8313 RUNNING SPRING DRIVE, LOUISVILLE, KENTUCKY 40241

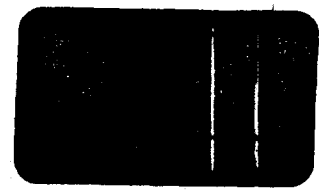
AGREED ORDER OF PROBATION

Come now the Kentucky Board of Medical Licensure (hereafter "the Board"),  
acting by and through its Hearing Panel B, and Seth S. Johnston, M.D., and, based upon  
their mutual desire to fully and finally resolve the pending Complaint without an  
evidentiary hearing, hereby ENTER INTO the following AGREED ORDER OF  
PROBATION:

STIPULATIONS OF FACT

The parties stipulate the following facts, which serve as the factual bases for this  
Agreed Order of Probation:

1. At all relevant times, Seth S. Johnston, M.D., has been licensed by the Board to  
practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Internal Medicine.
3. The licensee met Patient A through the course of his physician-patient relationship  
with Patient A's son. On November 5, 1996, Patient A accompanied her son to an  
office visit with the licensee. While she was there that day, the licensee began asking  
her questions about her physical condition. After his initial questioning of Patient A,  
the licensee had his staff create a new patient chart for her and arranged to physically  
examine her in his offices.



4. According to Patient A, the licensee had her undress and put on a paper gown.

Patient A relates that the licensee then examined her without a chaperon present in the examination room with them. According to Patient A, the licensee made inappropriate sexual comments to her during this examination. Patient A alleges that the licensee also touched her breasts and public area in a sexual, rather than medical, manner during their time alone on that date. Patient A recounts that the licensee also hugged her, pulling her close, and Patient A felt the licensee's erect penis through his clothing.

5. The licensee denies any inappropriate touching of Patient A. He confirms that he conducted a medical examination of her on November 5, 1996. The licensee states that he did so, after Patient A expressed an interest in changing medications. The licensee states that he first took a medical history from Patient A. He then states that he conducted a limited physical examination of Patient A, with an EKG. According to the licensee, an employee, Patricia Polston stood at the open door to the examination room, with the privacy curtain drawn around the licensee and Patient A, during this limited physical examination. The licensee notes that Ms. Polston was required to stand in that position that day because his other assistant had left work early; Ms. Polston had to listen for the telephone and the door to the office. Although the licensee states that he did not examine Patient A's breasts or public area that day, he acknowledged that her breasts appeared normal during his cardiac auscultation and electrode placement for the EKG. After the physical examination, the licensee relates that Patient A was left to dress in privacy. When he returned to the room, Patient A was despondent. The licensee states that he put his arm around her shoulder to

comfort her. The licensee then relates that Patient A made a return appointment before leaving the office.

6. During her initial interview, Ms. Polston acknowledged that she watched the entire examination of Patient A from the office doorway, because the other assistant had left early that day. During a subsequent interview, after she had terminated her employment with the licensee, Ms. Polston stated that she was present while the licensee examined the patient's heart, lungs and abdomen; she then left the exam room along with the other medical assistant when they were instructed to do so by the licensee. During this second interview, Ms. Polston stated that, despite a letter from the Board in 1997 suggesting the licensee have a chaperon present during physical examinations, the licensee was frequently alone with female patients for extended periods, examining them without anyone present. According to Ms. Polston, there were frequently occasions when she would walk into an examination room to find the licensee examining a female patient and the patient would be undressed from the waist up, without being covered by a cape or gown.
7. On May 30, 1997, the Board's Inquiry Panel A had issued a Letter of Concern to the licensee, suggesting that he have a chaperon present during a physical examination. This Letter of Concern was issued based upon the Inquiry Panel's initial review of Patient A's grievance.
8. Employee B was employed by the licensee, as a receptionist, from January through May 1998. According to Employee B, she quit her employment with the licensee because he sexually harassed her. According to her, the licensee would frequently tell her "dirty" jokes and make inappropriate sexual comments. Employee B stated

that, on multiple occasions, the licensee would come up behind her and start rubbing her back. According to Employee B, he would also rub her hair and tickle her sides. Employee B reports that the licensee would call her pet names, such as "Luv," "Sweetheart," and "Honey," making her very uncomfortable. Employee B also reports that the licensee would tell her he loved her.

9. According to Employee B and other former employees, the licensee would often become verbally abusive.

10. In the response filed with the Board by his counsel, the licensee stated,

As it relates to [Employee B's] allegations regarding office conduct, Dr. Johnston at no time was informed by employees that the behavior of himself or other employees was bothersome or of such a nature as to cause complaints.

He specifically acknowledges that he has had employees who were unable to perform the tasks for which they were hired. [Employee B] was a receptionist rarely in room patient contact with Dr. Johnston or his patients. She was employed for approximately two months. Since Dr. Johnston is not aware of the other ex-employees who are complaining, it is hard for him to respond generally to their complaints. He does not deny that he is a demanding physician. His voice may have intimidated some individuals, but it was not specifically brought to his attention. He expected employees to perform their tasks as he felt necessary in delivery of services to his patients. He prides himself on being a good clinician and being responsive to his patient's needs. No one ever suggested to him that he needed some form of anger management or that his behavior was embarrassing to others. He maintains that he regularly uses chaperones for any and all physical examinations of females. This policy has continuously been in effect during his practice.

Dr. Johnston also wants to further remind the Board that he was not given the opportunity to respond in 1998 when these allegations were originally made. While this would not have changed his general denial, it certainly puts him in a precarious position in terms of remembering specifically what was occurring at that timeframe. Asking him to view his specific actions with patients and employees from more than two years ago puts him at an obvious disadvantage. Nevertheless, he stands by his denial that his behavior towards patients were anything but professional.

11. After the Panel's second review of this grievance, Patient A notified the Board by letter dated August 24, 2000 that she withdrew her complaint against the licensee.



### STIPULATED CONCLUSIONS OF LAW

The parties stipulate the following Conclusions of Law, which serve as the legal bases for this Agreed Order of Probation:

1. The licensee's Kentucky medical license is subject to regulation and discipline by the Board.
2. Current Opinion 3.08 of the American Medical Association's Code of Ethics provides, in part,

Sexual harassment may be defined as sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) such conduct interferes with an individual's work or academic performance or creates an intimidating, hostile, or offensive work or academic environment or (2) accepting or rejecting such conduct affects or may be perceived to affect employment decisions or academic evaluations concerning the individual. Sexual harassment is unethical.

3. While the licensee denies the allegations by Patient A and would present evidence contesting the allegations set forth in the Complaint if there were an evidentiary hearing, he acknowledges that there are sufficient allegations set forth in the Stipulations of Fact which would permit findings by the Hearing Panel that he had violated the provisions of KRS 311.595(5) and 311.595(9), as illustrated by KRS 311.597(4).
4. Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally resolve the pending grievance by entering into an informal resolution, such as this Agreed Order of Probation.

### AGREED ORDER OF PROBATION

Based upon the foregoing Stipulations of Fact and Stipulated Conclusions of Law, and, based upon their mutual desire to fully and finally resolve the pending Complaint

without an evidentiary hearing, the parties hereby ENTER INTO the following

**AGREED ORDER OF PROBATION:**

1. The license to practice medicine in the Commonwealth of Kentucky held by Seth S. Johnston, M.D., is hereby PLACED ON PROBATION for a PERIOD OF FIVE (5) YEARS, with that period to commence immediately upon the filing of this Agreed Order of Probation.
2. During that period of probation, the licensee's Kentucky medical license SHALL BE SUBJECT to the following TERMS AND CONDITIONS OF PROBATION:
  - a. The licensee shall not have sexual contact with any patient, with any employee of his medical practice, and/or with any employee of any hospital at which he is employed.
  - b. The licensee shall not conduct any sensitive examination or be in the presence of a female patient who is partially or fully disrobed, unless he is accompanied at all times by an individual who has previously agreed to serve as a chaperon, under the terms specified in the standard letter provided by the Board for this purpose.
  - c. The licensee shall ensure that each person who acts as a chaperon to fulfill the requirements of paragraph 2b, supra, shall prior to serving in that capacity complete and sign a letter provided for that purpose by the Board, in which the individual agrees in writing to 1) remain present and within direct eyesight and within clear hearing distance of the licensee and the patient throughout the entire period the licensee is with the female patient; 2) accurately record the chaperon's presence, or absence, for the entire duration of such patient interaction in the patient's chart, or the patient record maintained by that clinical setting; 3)

immediately notify the designated contact person at the Board's offices to report any violation of the chaperon requirement by the licensee. The licensee may arrange for more than one individual to act in the capacity of chaperon. He shall be solely responsible for any costs associated with this requirement.

- d. Within ten (10) days of the completion of such letter(s) by an individual(s) acting as chaperon for the licensee, the licensee shall provide a copy of each completed letter to the Board's agents. The licensee shall also maintain a separate log documenting each patient seen with a chaperon and the name, title and location of the chaperon utilized. Upon request, the licensee shall permit the Board's agents to review this log and shall take all necessary steps to arrange for the Board's agents to review the patient(s)' chart(s) and to interview the chaperon(s).
- e. Within six (6) months of the filing of this Agreed Order of Probation, the licensee shall successfully complete, at his cost, an accredited anger management program that has been approved in advance by the Board or its staff. The licensee shall provide written confirmation of his completion of such program to the Board's agents, within twenty (20) days of receipt of such written confirmation.
- f. The licensee shall not engage in any act which would constitute sexual harassment, as that term is defined in Current Opinion 3.08, with any employee of his medical practice and/or with any employee of any health care facility at which the licensee may practice medicine.
- g. The licensee shall fully comply with all provisions of the Kentucky Medical Practice Act, KRS 311.530 *et seq.*

3. The licensee understands and agrees that violation of any of these terms and conditions shall provide a legal basis for immediate suspension of his Kentucky medical license and may result in further disciplinary action, including revocation.
4. The licensee expressly agrees that, if he should violate any term or condition of this Agreed Order of Probation, the licensee's practice will constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125. The parties further agree that, if the Board should receive information that he has violated any term or condition of this Agreed Order of Probation, the Panel Chair is authorized by law to enter an Emergency Order of Suspension or Restriction immediately upon a finding of probable cause that a violation has occurred, after an *ex parte* presentation of the relevant facts by the Board's General Counsel or Assistant General Counsel. If the Panel Chair should issue such an Emergency Order, the parties agree and stipulate that a violation of any term or condition of this Order would render the licensee's practice an immediate danger to the health, welfare, and safety of patients and the general public, pursuant to KRS 311.592 and 13B.125; accordingly, the only relevant question for any emergency hearing conducted pursuant to KRS 13B.125 would be whether the licensee violated a term or condition of this Agreed Order of Probation. At any such emergency hearing, the licensee may establish that the suspension/restriction should not continue because, in spite of the licensee's best efforts to comply, it was impossible for the licensee to

comply with the term(s) or condition(s) in question, or because the licensee did not  
violate any term(s) or condition(s) of this Agreed Order of Probation.

SO AGREED on this 17 day of January, 20 02.

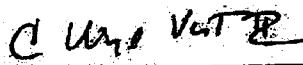
FOR THE LICENSEE:

  
SETH S. JOHNSTON, M.D.

  
ERIC M. JENSEN, ESQ.  
COUNSEL FOR DR. JOHNSTON

FOR THE BOARD:

  
PRESTON P. NONNELLEY, M.D.  
CHAIR, HEARING PANEL B

  
C. LLOYD VEST II  
General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
(502) 429-8046

ENTERED: 01/17/02

**WAIVER OF RIGHTS**

I, **SETH S. JOHNSTON, M.D.**, am presently the Respondent in Kentucky Board of Medical Licensure Case No. 788. I understand that, under 201 KAR 9:082, I must waive certain rights if I wish to resolve this matter by informal dispensation. Accordingly, I **WAIVE** my right to raise any constitutional, statutory or common law objection(s) I may have to the Hearing Panel rejecting the proposed informal dispensation or to the curtailment of such a settlement by the Board's General Counsel.

Furthermore, if the Hearing Panel accepts the proposed **AGREED ORDER OF PROBATION** as submitted, I **WAIVE** my right to demand an evidentiary hearing or to raise additional constitutional or statutory objections in this matter. However, if the Hearing Panel should reject the proposed **AGREED ORDER OF PROBATION**, I understand that further proceedings will be conducted in accordance with KRS 311:530 et seq. and I will have the right to raise any objections normally available in such proceedings.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

  
\_\_\_\_\_  
**SETH S. JOHNSTON, M.D.**  
Respondent

  
\_\_\_\_\_  
**ERIC M. JENSEN, ESQ.**  
COUNSEL FOR DR. JOHNSTON

COMMONWEALTH OF KENTUCKY  
STATE BOARD OF MEDICAL LICENSURE  
CASE NO. 780

FILED OF RECORD  
FEB 14 2001  
K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF  
KENTUCKY HELD BY SETH S. JOHNSTON, M.D., LICENSE NO. 31767,  
4001 KRESGE WAY, #130, LOUISVILLE, KENTUCKY 40207

**COMPLAINT**

Comes now the Complainant Kathie E. Grisham, Esq., Chair of the Kentucky Board of Medical Licensure's Inquiry Panel A, and on behalf of the Panel which met on August 17, 2000 and November 16, 2000, states for its Complaint against Licensee, Seth S. Johnston, M.D., as follows:

1. At all relevant times, Seth S. Johnston, M.D., was licensed by the Kentucky Board of Medical Licensure (hereafter "the Board") to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Internal Medicine.
3. Patient A first met the licensee when her son was being treated in the emergency room at Baptist Hospital East. Her son had been diagnosed with possible pancreatitis and the examining physician had called the licensee in for a consultation. After seeing Patient A's son at the hospital, the licensee scheduled the son for an office visit. Patient A accompanied her son to the office visit. During the course of the licensee's treatment of her son, on or about November 5, 1996, he arranged to perform a physical examination of her. After having her undress and put on a paper gown, the licensee examined Patient A without a chaperon present. During the course of the examination, the licensee made inappropriate sexual comments to Patient A. He also touched her breasts and pubic area in a sexual, rather than medical, manner. During his encounter(s) with Patient A, the licensee hugged her,

pulling her close to him, while he had an erection. The licensee also attempted to kiss Patient A during this encounter.

4. By engaging in such conduct, the licensee violated the provisions of KRS 311.595(5) and 311.595(9), as illustrated by KRS 311.597(4)[violations of Current Opinions 8.14 and 8.145 of the American Medical Association's Code of Ethics].
5. Employee B was employed by the licensee from January 19, 1998 through March 24, 1998. During the time she was so employed, the licensee made inappropriate sexual remarks to her on multiple occasions. The licensee also touched Employee B without her consent or encouragement. He would rub her back and her hair on occasion. On certain of these occasions, the licensee would rub her back until he located her bra line. He would also tickle her sides and laugh. On one occasion, the licensee grabbed and hugged Employee B in front of another person, making inappropriate intimate remarks.
6. Current Opinion 3.08 of the American Medical Association's Code of Ethics provides,

Sexual harassment may be defined as sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) such conduct interferes with an individual's work or academic performance or creates an intimidating, hostile, or offensive work or academic environment or (2) accepting or rejecting such conduct affects or may be perceived to affect employment decisions or academic evaluations concerning the individual. Sexual harassment is unethical.

7. By engaging in such conduct with Employee B, the licensee has violated the provisions of KRS 311.595(9), as illustrated by KRS 311.597(4).
12. Respondent is directed to respond to the allegations delineated in the Complaint within thirty (30) days of service thereof and is further given notice that:
  - (a) His failure to respond may be taken as an admission of the charges;




(b) He may appear alone or with counsel, may cross-examine all prosecution witnesses and offer evidence in his defense.

13. NOTICE IS HEREBY GIVEN that a hearing on this Complaint is scheduled for July 31 & August 1, 2001, at 9:00 a.m., Eastern Standard Time, at the Kentucky Board of Medical Licensure, Hurstbourne Office Park, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Said hearing shall be held pursuant to the Rules and Regulations of the Kentucky Board of Medical Licensure. This hearing shall proceed as scheduled and the hearing date shall only be modified by leave of the Hearing Officer upon a showing of good cause.

WHEREFORE, Complainant prays that appropriate disciplinary action be taken against the license to practice medicine held by Seth S. Johnston, M.D.

This 14th day of February, 2001.

  
KATHIE E. GRISHAM, ESQ.  
Chairman, Inquiry Panel A

#### CERTIFICATE OF SERVICE

I certify that the original of this Complaint was delivered to Mr. C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222 and a copy was mailed, postage prepaid to, Division of Administrative Hearings, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 and a copy was mailed via certified mail to Seth S. Johnston, M.D., 4001 Kresge Way, #130, Louisville, Kentucky 40207 on this the 14th day of February, 2001.



C. LLOYD VEST, II  
General Counsel  
Kentucky Board of Medical Licensure  
310 Whittington Parkway, Suite 1B  
Louisville, Kentucky 40222  
502/429-8046

## **"Exhibit C"**

### **Terms of Probation**

1. Respondent shall conduct himself/herself in all ways in a manner befitting his/her professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his/her profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by New York State. This includes but is not limited to the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law section 171(27)]; State Finance Law section 18; CPLR section 5001; Executive Law section 32].
5. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
6. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include; but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.
7. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

8. Respondent shall, in the course of practicing medicine in New York State, examine and/or treat any female patient only in the presence of a chaperone. The chaperone shall be a female licensed or registered health care professional or other health care worker, shall not be a family member, personal friend, or in a professional relationship with Respondent which could pose a conflict with the chaperone's responsibilities. The chaperone shall be proposed by Respondent and subject to the written approval of the Director of OPMC.

9. Prior to the approval of any individual as chaperone, Respondent shall cause the proposed chaperone to execute and submit to the Director of OPMC an acknowledgment of her agreement to undertake all of the responsibilities of the role of chaperone. Said acknowledgment shall be made upon a form provided by and acceptable to the Director. Respondent shall provide the chaperone with a copy of the Order and all of its attachments and shall, without fail, cause the approved chaperone to:

a. Report quarterly to OPMC regarding her chaperoning of Respondent's practice.

b. Report within 24 hours any failure of Respondent to comply with the Order, including, but not limited to, any failure by Respondent to have the chaperone present when required, any sexually suggestive or otherwise inappropriate comments by Respondent to any patient, and any actions of a sexual nature by Respondent in the presence of any patient.

c. Confirm the chaperone's presence at each and every examination and treatment of a female patient by Respondent, by placing her name, title and date in the patient record for each and every visit, and by maintaining a separate log, kept in her own possession, listing the patient name and date of visit for each and every patient visit chaperoned.

d. Provide copies of the log described in paragraph c, above, to OPMC at least quarterly and also immediately upon the Director's request.

10. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.